from a recent decision of the Supreme Court, declares that a state law which forbids the joint education of white and colored persons in private schools violates the federal Constitution. *Berea College* v. *Commonwealth*, Nov. 9, 1908. The point is unsatisfactorily evaded by the majority, who hold the statute valid in the particular case as an amendment of a corporate charter. This conclusion involves questionable holdings as to the separability of legislation and the power to impair a corporate grant; the minority opinion on these points appears preferable. But had the main point been squarely met, it is believed that the same result would have been correct, and that herein the minority err.[1] The question is not one of race discrimination, since the statute affects white and black pupils alike; but simply whether the state has made such proper use of its police power that teachers and pupils, the freedom of whose action is thereby limited, cannot successfully invoke the fourteenth amendment.

Similar constitutional [2] and statutory [3] provisions have been construed only in cases concerning public schools.[4] It is settled that local officers of education may segregate the two races, provided they offer equal advantages to both;[5] but they cannot assume to fix the policy of the state by drawing the color line without express statutory sanction.[6] Such matters, however, of policy in the execution of a public function obviously present a different problem from the present.

No case with similar facts has been found; but the statutes prescribing "Jim Crow cars" raise an analogous point. The Supreme Court squarely held such legislation to be a valid exercise of the police power, Mr. Justice Harlan vigorously dissenting.[7] It may be thought that this case was easier, and the dissent more clearly mistaken, because the state has peculiar control over common carriers. On the other hand, the policy of the state in segregating the races may be said to have more justification in the principal case, since the experience of children in school has deeper relation to the morals and health of the community than the mere superficial contact of passengers in railroad cars. The state's right to prohibit miscegenation is unquestioned;[8] to prohibit joint education is not much more of a step. Mr. Justice Harlan alarmedly prophesies compulsory segregation in church, meeting-house, and market-place. The answer is that each case on the exercise of the police power will be decided according to its own facts, and will depend peculiarly little upon analogous precedents.[9]

THE CONSTITUTIONALITY OF STATUTORY COMMITMENT OF DEFENDANTS ACQUITTED OF CRIME BECAUSE OF INSANITY.— In a recent case the defendant was acquitted of homicide because of insanity at the time of the act. The court thereupon committed him to an asylum under a statute which provided for such commitment if in the opinion of the court

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1 Freund, Police Power, 718.
2 Const. W. Va., Art. xii, § 8.
3 *Cf.* Ga. Code, § 1378.
4 Martin *v.* Bd. of Education, 42 W. Va. 514.
5 Lehew *v.* Brummell, 103 Mo. 546.
6 Bd. of Education *v.* State, 45 Oh. St. 555.
7 Plessy *v.* Ferguson, 163 U. S. 537.
8 *Ex rel.* Hobbs, 1 Woods (U. S.) 537.
9 See Berea College *v.* Commonwealth, 29 Ky. L. Rep. 284.

the defendant's discharge would be dangerous to the public safety. Subsequently a writ of *habeas corpus* was dismissed because in the opinion of the asylum superintendent the defendant continued to be insane. *People ex rel. Peabody* v. *Baker*, 59 N. Y. Misc. 359. Such statutes providing for confinement at the discretion of the court are common. Furthermore, the ultimate release of the prisoner is often made a matter of discretion.[1] This legislation has resulted from the extent to which the plea of insanity is carried under the control of expert testimony, and is an attempt to obviate the evils resulting from the introduction of a mass of unreliable evidence.[2] That such legislation is intended to abrogate the defense of insanity to an indictment for homicide is unbelievable; for this result would be wholly at variance with the recognized theory that punishment for crime is justifiable only after accountability for the act is proven.

As the statute deprives a person of liberty after an acquittal, its constitutionality must be tested by the provisions of the Fourteenth Amendment.[3] And inasmuch as a person acquitted because of insanity at the time of the commission of the act is as clearly entitled to all his constitutional rights as if acquitted for any other reason, the alleged insane defendant's commitment, to be valid, must be by due process of law.[4] In ordinary commitment proceedings the alleged insane person must have notice of the inquisition,[5] and only after trial of the issue and verdict may a valid judgment of commitment be pronounced.[6] Thus the due process clause secures to a person declared insane a regular judicial trial before a deprivation of liberty:[7] in fact, in providing a fair trial there seems to be no distinction between alleged insanity and alleged criminality.[8] Therefore, where a defendant has been acquitted because of past insanity, the question as to his present state of mind can be determined only after fair trial.[9]

It is obvious that during the trial of the indictment for homicide the issue of present insanity was not subjected to any judicial investigation,[10] and the discretionary determination provided by these statutes for the commitment of insane defendants without any opportunity given for defense is made wholly on an *ex parte* proceeding.[11] It is, however, maintained that such commitment is valid because of the presumption of the continuance of insanity.[12] But obviously the existence of a presumption cannot of itself abridge the defendant's constitutional right to be heard in his own defense. And yet in so far as these statutes provide for a temporary confinement until a fair trial may be had, they should be upheld. For the right of the courts to confine an insane defendant was recognized at common law,[13] and the public welfare demands that a person who may be dangerously insane should not be immediately set free. In view of these considerations the

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1 See Gleavon *v.* West Boylston, 136 Mass. 489.
2 See Underwood *v.* People, 32 Mich. 1.
3 Brown *v.* Urquhart, 139 Fed. 846.
4 *In re* Boyett, 136 N. C. 415.
5 State *v.* Billings, 55 Minn. 467. *Contra*, Dowdell, Petitioner, 169 Mass. 387.
6 People *ex rel. v.* St. Saviour's Sanitarium, 56 N. Y. Supp. 431.
7 Simon *v.* Craft, 182 U. S. 427.
8 See Buswell, Insanity, § 19.
9 Brown *v.* Urquhart, *supra.*
10 Shultz *v.* State, 13 Tex. 401.
11 Van Deusen *v.* Newcomer, 40 Mich. 90.
12 *In re* Brown, 39 Wash. 160.
13 Hadfield's Trial, 27 How St. Tr. 1281; Hale, P. C. 32–35.

Fourteenth Amendment should be construed as securing to insane defendants, not the right to an unconditional discharge after acquittal, but the right not to be permanently deprived of liberty without a judicial trial.[14] The New York statute makes no provision whatever for such a trial and would therefore seem to be unconstitutional.

THE DOMICILE OF PERSONS NON SUI JURIS. — Domicile is a relation between an individual and a particular locality or country. The domicile of origin continues until a domicile of choice is acquired by the act of residence in a particular place coupled with an intention to continue to reside there. Generally it is impossible for a person *non sui juris* to change his domicile; for he has no legal right to an intention of his own. But it is often important to determine to what extent some one else may change his domicile for him. The domicile of a wife is that of her husband, except that in most states she is allowed to acquire a different domicile for the purpose of suing for a divorce.[1] The domicile of an infant follows the father's, because the infant is an integral part of his father's home and cannot legally have a home elsewhere. The father may change it at will, subject to the exercise of the jurisdiction of equity to prevent acts to the prejudice of persons under legal disabilities.[2]

The power of a guardian to change the domicile of his ward presents a more difficult problem. When his father dies an infant's domicile remains that of the father, and neither the mother nor the next of kin has power to change it, since the infant does not bear the same legal relation to them as to his father. But if he in fact lives with his mother, she becomes his natural guardian, and can change his national domicile, so long as she remains unmarried.[3] A legal guardian of the infant's person has been held not to have the same power.[4] Within the state which appointed him the guardian has undoubted power to say where his ward shall make his home, and any place so designated will be regarded as the infant's domicile.[5] As to his ability to affect his ward's domicile in a foreign jurisdiction the authorities are in conflict.[6] The better view appears to be that the powers of the guardian do not extend beyond the boundaries of the state that appointed him.[7] A New York justice of the peace is not a justice of the peace in Massachusetts; nor is a Massachusetts guardian a guardian in

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[14] *In re* Brown, *supra*.

[1] As a married woman is *non sui juris*, and, even in states where most of her disabilities are removed by statute, has no right to live apart from her husband until after the divorce, the general rule is theoretically wrong. She would have adequate protection if equity merely gave her the right to prevent her husband from changing her domicile after cause for divorce. See Yelverton *v.* Yelverton, 1 Sw. & Tr. 574; Maguire *v.* Maguire, 7 Dana (Ky.) 181. *Cf.* 20 HARV. L. REV. 416.

[2] In the case of father and child this jurisdiction is seldom exercised. It is more commonly used in the case of guardian and ward. See School Directors *v.* James, 2 W. & S. (Pa.) 568. As to emancipated minors, see 19 HARV. L. REV. 215.

[3] See Lamar *v.* Micou, 112 U. S. 452. If there is no mother, a grandparent or other next of kin may be the natural guardian. *In re* Benton, 92 Ia. 202.

[4] Daniel *v.* Hill, 52 Ala. 430. As to the powers of a testamentary guardian, see Wood *v.* Wood, 5 Paige (N. Y.) 596; White *v.* Howard, 52 Barb. (N. Y.) 294, 318.

[5] Kirkland *v.* Whately, 4 Allen (Mass.) 462.

[6] Wheeler *v.* Hollis, 19 Tex. 522; Mears *v.* Sinclair, 1 W. Va. 185.

[7] Story, Confl. L., § 499; Rogers *v.* McLean, 31 Barb. (N. Y.) 304, 309, 310. But see State *v.* Lawrence, 86 Minn. 310.